BRUNEI REPORT

PACIFIC ELECTRICAL CO. LTD. v. SENG HUP ELECTRICAL CO. (S) PTE. LTD.

[C.A. (Rigby (President), Pickering and Leonard JJ.A.) March 9, 1977]

[Brunei — Civil Appeal No. 4 of 1976]

Contract — Contract for supply of crystal chandeliers — Whether time of the essence of the contract — Breach of contract — Damages,

In this case the respondents had agreed to supply a substantial quantity of electrical equipment including four crystal chandeliers. Under the agreement the date of delivery of the chandeliers was one month from the date of agreement which was on December 2, 1974. The appellants issued irrevocable letters of credit to the respondents and the shipment date was stated to be January 20, 1975. On January 13, 1975 the respondents wrote to the appellants that there would be a delay in the supply of the chandeliers. On January 23, 1975 the appellants purported to cancel the contract for the chandeliers on the ground that they were urgently required. On January 27, 1975 the respondents sent a telegram stating that the goods were ready for shipment and they were prepared to send it by air-freight. The appellants did not accept the offer and purported to cancel the contract. The respondents thereupon instituted proceedings claiming specific performance, alternatively damages. The learned trial judge held that on the facts time was not of the essence of the contract and he gave judgment for the respondents. The claim for specific performance was abandoned at the trial and the learned judge awarded damages reflecting the full contract price of the chandeliers. The appellants appealed.

Held: (1) the learned trial judge in this case was wholly right in coming to the conclusion that time was in no way of the essence of the contract;

(2) the respondents were under an obligation to mitigate their damages and as no evidence had been produced to show that efforts had been made by them in this respect, there must be a retrial on the issue of damages.

COURT OF APPEAL.

Lin Kuan Yuh for the appellants.

Shelley Yap for the respondents.

In the court below the following judgment was delivered on October 11, 1976:

Cons J.: This judgment was originally given extempore in open court at the close of the case. I have reduced it to writing at the request of the parties.

The claim arises upon a contract for the sale of electrical fittings. The major part relates to four crystal chandeliers which were especially made in Germany for the decoration of the Istana Darul Tiana then under construction. Mr. Yeo Ban Tai of the defendant company flew to Singapore and placed the order with the plaintiff company. He does not dispute that order or that he subsequently refused to take delivery. He says that he was entitled to do so because he had cancelled the order when the plaintiff failed to deliver in due time.

The plaintiff does not accept that cancellation. He says firstly that the defendant had no right to cancel because any right to cancel for delay was expressly excluded from the contract. He relies upon a condition printed upon the reverse of the documents making up the defendants' part of the contract, and which were all signed by Mr. Yeo. That condition reads as follows:

"Default in delivery or delays shall not entitle the Buyers to cancel this Contract and no claim or other compensation shall lie against the Company in respect of any loss suffered thereby by the Buyers."

Counsel for the defendant submits that this condition does not form part of the contract because it appears only on the reverse of the documents and there is nothing on their face to draw the condition to the attention of the person signing or to indicate that he should for any reason turn over. I agree with that argument. The defendant himself goes further and says expressly that he did not see the condition at the time of signing and that it was not drawn to his attention. I do not necessarily accept his word for that, but it does not matter. Where the condition is not obvious upon the face of the contract it is up to the party relying upon it to show that the other party knew or should have known of its existence. The only way that the plaintiff could have done that in the particular circumstances was through a witness who is no longer available to him. It was suggested that Mr. Yeo must have seen the condition on the reverse of the first document when he signed the second, and so on. I do not accept that. He said that he signed without reading even the face of the documents and I can well believe that of him. And in that case it would be easy to sign each paper by merely pushing up the one above it. The plaintiff fails on this point.

It is therefore not necessary for me to deal with the question of an express waiver by Mr. Eric Teo, the person from the plaintiff company who then dealt with Mr. Yeo Ban Tai, was no longer available. But for the record I should say that I think it unlikely to have succeeded. It would have depended solely on the word of Mr. Yeo. He made a very poor impression upon me and I am not inclined to place much weight on his evidence.

The other question is whether time was of the essence of the contract, for where it is a buyer is entitled to rescind when the seller fails to meet the due date. Time usually is of the essence of commercial contracts. But it is not always necessarily so. The circumstances may show otherwise. In this case I think they do and for the following reasons:

1. The contract uses simply the words "Delivery:— One Month". It does not give a specific date. It does not even say "by" or "within" one month. There is nothing to show from when the month would start to run.

2. The letter of credit drawn on the instruction of Mr. Yeo gives a last date for shipment which was some seven weeks after the signing of the contract and was also later than what Mr. Yeo now says was the completion date for the Istana contract.

3. Mr. Yeo took no action at all upon receipt of the plaintiff's letter at January 13.

4. He purported to cancel the contract on January 23 without making further enquiry from the plaintiffs as to whether the goods had by then arrived in Singapore, although he would have realized from the plaintiffs' earlier letter that there was a very good chance that this was so. Indeed, on the 27 he knew for certain that this was so and furthermore that the plaintiffs were willing to air-freight the goods to Brunei

at their own expense. In that case they would have arrived almost as quickly as if they had been shipped by sea upon the last date allowed by the letter of credit. Instead Mr. Yeo ordered four duplicate chandeliers direct from the manufacturer in Germany, an order which he knew would take several weeks to be fulfilled. The only conclusion is that cost rather than time was then uppermost in his mind.

I appreciate that the defendants originally insisted upon air-freighting the goods from Germany. This indicates some concern over time, but it does not necessarily indicate the urgency that Mr. Yeo seeks to impress on me. I am satisfied that the agreed terms of the contract did not include a particular date by which it had to be performed. The law then allows a reasonable time. The plaintiff was still within that time when Mr. Yeo purported to cancel. He had no right to do so. His subsequent refusal to accept delivery was itself a breach and his firm is liable in damages.

The damages must be limited to the cost of the four chandeliers. The other items are standard and either have been, or soon will be, sold from the plaintiffs' shop in Singapore. Mr. Yap, who appeared for the plaintiffs, says that he no longer seeks to have an order for specific performance in his favour. But that must be the practical result. I can see no possibility that the chandeliers will be sold in Singapore or indeed anywhere else. The damages will therefore reflect the full contract price. In that case it is right that the defendant should be given the chance, if he still wishes, and within a reasonable time, to be able to take possession as he would have done under the original contract. A reasonable time would be two months.

I should add that during the trial defence counsel specifically abandoned his counterclaim and the first line of his defence, that is, that the defendant was not a party to the contract at all.

From the above judgment the defendants appealed to the Court of Appeal. In the Court of Appeal the following judgments were delivered:

Rigby (President): This is an appeal from a judgment of Mr. Justice Cons whereby he gave judgment for the respondent as against the appellant for damages for breach of contract.

The appeal arises out of the following facts which were before the learned trial judge. By an agreement dated the 2nd of December, 1974, the Appellant Co., the Pacific Electrical Co. Ltd. who carry on business in Brunei (and to whom I will hereafter refer to as the Defendant Co.) entered into an agreement with the respondents, the Seng Hup Electrical Co. Ltd., a firm carrying on business in Singapore (and to whom I will hereafter refer to as the Plaintiff Co.). The agreement was for delivery of a substantial quantity of electrical equipment, including in particular 4 crystal chandeliers which were the subject-matter of this claim. The crystal chandeliers were to be especially made in Germany and they were for the decoration of the Istana Darul Hana then under construction for His Highness the Sultan's brother. Under the agreement itself the date of delivery was one month as from the date of the agreement which was the 2nd of December, 1974. In furtherance of that agreement the Defendant Co. issued irrevocable letters of credit in favour of the Plaintiff Co. Those letters of credit were dated the 5th of December, 1974, and the shipment date stated in the letters of credit for the goods to be delivered was not later than the 20th of January, 1975. On the 13th of January, 1975, the Plaintiff Co. wrote a letter to the Defendant Co. in the course of which they stated that all the goods were ready for delivery "except for the 4 pieces of special crystal ceiling which would arrive by air around the 15th of January." The reason for the delay in the delivery of those 4 crystal chandeliers was expressly stated in the letter to be that "there was a delay in the manufacturing of those 4 ceiling lights because the factory was closed for 3 weeks for the Christmas and New Year holidays." The Defendant Co. did, of course, receive that letter. Thereupon, on the 23rd of January, some 10 days later, without making any further enquiry in the meantime from the Plaintiff Co. as to whether the goods had already arrived in Singapore and were ready for shipment to Brunei, they wrote a letter of that date purporting to cancel the contract on the ground that the light fittings were "urgently required" by their customers and that there had been delay in the date of delivery. The Plaintiff Co.'s reply to that letter, not unnaturally, was to send a telegram dated the 27th of January, in the course of which they stated "cancellation definitely not possible, all fittings are now ready for shipment, we prepared to send by air-paid immediately on our expense." The Defendant Co. were not prepared to accept that offer contained in the telegram and purported to cancel the contract. As a result the Plaintiff Co. immediately instituted proceedings claiming, *inter alia*, specific performance of the agreement, alternatively damages for breach of contract. At the trial the Defendant Co. sought to contend that time was of the essence of the contract and that they were entitled to rescind the contract by virtue of the fact that the goods had not been delivered in proper time. The defendant himself said in evidence that "I would not have purchased the goods if the Plaintiff had not assured me of delivery within one month." It would seem difficult to accept that statement having regard to the fact that the letters of credit dated the 5th of December had, in fact, substantially extended the original time of one month stated in the letter of agreement by a matter of some 3 weeks. However, he then later went on to say that completion date with his principal contract or was the 15th of January. If, indeed, completion date with the principal contractor was the 15th January and time was of the essence of the contract it is difficult to understand why the letters of credit dated the 5th of January had extended the time for shipment to the 20th of January which would, of course, have been some 5 days later than the actual date of completion with the principal contractor. It is abundantly clear from the evidence that the learned trial judge was wholly satisfied that time was not, indeed, of the essence of the contract, and he expressed in some detail his reasons for coming to that conclusion. Firstly, he pointed out that in the contract itself the words were "delivery one month" without giving a specific date nor did it go on to say even that it was by or within one month, and there was nothing to show from when the month

would start to run. Secondly, he pointed out, as indeed I have mentioned, that the date of shipment contained in the Letter of Credit extended the date for delivery of the goods. Thirdly, he pointed out that the Defendant Co. purported to cancel the contract despite the fact that they had received the telegram on the 27th of January from the Plaintiff Co., pointing out that the goods were already ready for shipment and the Plaintiff Co. was prepared to send them by air freight. Despite that fact, the Defendant Co. then thought fit to communicate direct with the manufacturers in Germany placing an order for the same crystal chandeliers knowing, as they must have known, that delivery in those circumstances would take considerably longer than delivery of the chandeliers from the Plaintiff Co.; those chandeliers being already in Singapore ready for air freight delivery to the Defendant Co.

For these reasons the learned trial judge was satisfied, as indeed so am I, that the suggestion—or the submission—that time was the essence of the contract was a wholly invalid argument, and he dismissed that argument. He came to the conclusion, a conclusion which for my part seems to be irresistible, that the Defendant Co. thought fit to take advantage of an opportunity to cancel this contract because they believed that they could obtain the same goods more cheaply by ordering directly from Germany. The same arguments as were advanced before the learned trial judge in support of the contention that time was of the essence of contract have been advanced by Mr. Lin before this court. For my part, I am wholly satisfied, for the reasons which I have indicated, that those arguments must fail, and that the learned trial judge was wholly right in coming to the conclusion that time was in no way of the essence of the contract in this matter. Mr. Lin then contended that the learned trial judge was wrong in his assessment of the damages. The manner in which he assessed the damages was based solely upon the evidence given by the manager of the Plaintiff Co., and what he said as to that was that he had displayed the chandeliers in his showroom for over a year but they were not saleable and they were huge ceiling lights specially ordered for the Istana project, that they were not suitable for usual residential use, and that they were, indeed, to use the expression used by the witness himself as appears on the record "they were, prepared tailor-made according to plans submitted by the defendant." The normal measure of damages would, of course, be the difference, if any, between the contract price and the price the chandeliers would have fetched on the open market at the date of the breach. The learned trial judge, in dealing with the quantum of damages said this: "I can see no possibility that the chandeliers will be sold in Singapore or indeed anywhere else. The damages will, therefore, reflect the full contract price." Mr. Lin has argued before us that there was really wholly insufficient evidence upon which the learned trial judge could properly assess the quantum of damages. The learned trial judge then made an order, as I have said, that the measure of damages should be the full value of the 4 chandeliers. For reasons with which my brother Pickering is about to deal and reasons with which I am in entire agreement, I am satisfied that the course which my brother Pickering is about to indicate would be the proper way of dealing with this appeal, and I, therefore, now leave it to my brother Pickering to indicate these reasons.

Pickering J.A.: Let me say first that as to the issue of time being of the essence of the contract I concur fully with what has been said by the learned President. On the issue of damages much has been said in this court about the failure of Mr. Lin to cross-examine about attempts to re-sell these goods and he himself has, I think perhaps too readily, accepted some blame for not having done that. But the truth of the matter, when the case is looked at as a whole, is that at the trial before Cons J. mitigation was never, until the last moment, really a live issue. That was because the primary claim of the Plaintiffs was for specific performance. Now it has been said that the chandeliers were displayed in the showroom in Singapore. For what purpose I personally cannot imagine. They could not have been displayed for sale because there was an action for specific performance and it was simply not open to the plaintiffs to sell them. For anything I know to the contrary, half a dozen people may have come into the showroom and expressed interest in those chandeliers and been told, "I am sorry we can't sell them to you. We are anxious to deliver them to the fellow in Brunei who has broken his contract in regard to them and we are taking proceedings for that purpose". To that extent I think that Mr. Lin was justified in not cross-examining upon this issue. Similarly, it would have been a matter of some difficulty for the appellants to have turned round to the manufacturer in Germany and said, "what will you give us for these chandeliers in respect of which our customer has let us down upon his contract?", because it was not open to them, so long as they were seeking specific performance, to return the chandeliers to the manufacturers in Germany.

As the very last moment at the trial before Mr. Justice Cons, the claim for specific performance was abandoned. We are told by Mr. Shelley Yap that this was done upon the instructions of his professional principals in Singapore. There may be matters of which we are unaware, but on the information which is before us we are unanimously of the opinion that the decision to abandon the claim for specific performance was indeed a surprising one and that this was eminently a case which was likely to attract an order for specific performance. It was, in my view, as sound a case as could be imagined. But once specific performance was abandoned, then the court was concerned solely with damages for breach of contract and at that stage, for the first time, mitigation became a living issue. At that point the requirement was for further evidence as to what attempts the Plaintiffs had made to dispose of the chandeliers and so mitigate their damages and for further evidence as to what the defendants suggested could have been so done by the plaintiffs to dispose of them and was not done; but it was plain on such evidence as had been given in the case fought on the primary basis of specific performance, that no further evidence of that nature was immediately available. Without it, as I see it, the learned judge was not really in a position to assess damages, and the course which he took was in the result one wholly favourable to the plaintiffs and

wholly unfavourable to the defendants, except for what I might term a bonus to the defendants in the form of a free gift giving them the option within two months of saying that they would like delivery of the chandeliers. The bonus was accompanied by an attempt to place upon the plaintiffs an obligation to put the chandeliers aboard a ship in Singapore should the defendants so opt, an obligation which would have been completely unenforceable by the court of this State.

It is fair to say that no adjournment was applied for at that stage. But the abandonment of the claim for specific performance opened up a completely new vista and in my view an adjournment should then have been ordered to enable the plaintiffs who were then, by reason of such abandonment no longer under an obligation to retain the chandeliers to attempt to mitigate their damages; and for the defendants to produce evidence, if they were able to do so, as to what such efforts might reasonably have been made in the interim by the plaintiffs and with what probable financial results. That was not done, but judgment was given without all the necessary evidence to arrive at a valid assessment of damages. In my view the result arrived at is unlikely to have been the truly accurate result. Or if it proves so to be, that result was arrived at by a random route rather than on the basis of solid evidence.

It is for these reasons that it appears to me that the order of the learned judge in the court below should be set aside, that there should nonetheless remain judgment for the plaintiffs on the claim, that the defendants' counterclaim should remain dismissed, and that there should be a re-trial on the issue of damages. I would order that the costs in the court below should continue to be those of the plaintiffs and that each party should bear its own costs of this appeal.

Leonard J.A.: As to the question whether time was, on December 2, 1974, of the essence of the contract in the minds of the parties, the fundamental facts persuading me that it was not are that the contract itself gives no specific date for delivery but merely uses the phrase "Delivery one month", whereas the letter of credit opened in pursuance of it specifies that payment is to be made if "shipment" (as distinct from delivery) be effected not later than January 20, 1975. This even without the later correspondence between the parties referred to by the learned trial judge would be sufficient to persuade me that the parties never regarded time as of the essence. Accordingly, the respondent was at liberty to deliver within a reasonable time and was entitled to succeed on the issue of liability.

As to the issue of damages this has caused me considerably more difficulty. The only evidence as to damages is succinct in the extreme and is to be found in the evidence of the respondent at page 18 of the record. This evidence was unchallenged in cross-examination and no evidence was offered by the appellant to show how the respondent might, having regard to the unusual nature of the chandeliers, have mitigated and it is, of course, for a defendant to show how a plaintiff might have mitigated. The appellant here cannot be blamed for failure to adduce evidence in mitigation because of the late hour at which the claim for specific performance was abandoned. For these reasons I agree with the Orders proposed by Pickering J.A.

Order accordingly.